



## **U.S. Department of Labor** *Fair Labor Standards Act Clean-Up Regulations*

### **Labor Department Proposes Clean-up Regulations for Previous FLSA Statutory Amendments**

On July 28, 2008, the Department of Labor proposed in the *Federal Register* a Notice of Proposed Rulemaking (NPRM) to revise certain regulations under the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act), primarily updating them to reflect numerous statutory amendments that have been enacted since the rules were originally issued. This clean-up initiative was first announced in the Department's Semiannual Regulatory Agenda soon after amendments to the FLSA in 1996; additional revisions have been added as subsequent legislation and court decisions have occurred, or as the need to improve the clarity of existing regulatory text has become apparent.

The FLSA requires payment of the federal minimum wage and overtime pay, at time and one-half the regular rate of pay for hours worked over 40 per week, to all covered and nonexempt employees. The FLSA also contains a number of exemptions from the minimum wage and overtime requirements. The Portal Act provides for additional exclusions from pay under the FLSA, such as for certain preliminary activities performed before the workday starts that are not part of an employee's "principal" work activities (e.g., ordinary home-to-work commuting in an employer-provided vehicle under specified circumstances).

Some of the Department's regulations interpreting the FLSA's minimum wage and overtime pay requirements were originally issued many years ago and have not been revised or updated since. Statutory amendments since 1974 have refined and clarified some of the existing exemptions and created new exceptions. This proposal will update the regulatory guidance to reflect these statutory amendments. The revisions are summarized below.

- In 1974, Congress extended an existing FLSA overtime exemption to include any salesman primarily engaged in selling boats and eliminated the overtime exemption previously provided for partsmen and mechanics servicing trailers or aircraft. In addition, several appellate courts have interpreted the overtime exemption for "any salesman, partsmen, or mechanic primarily engaged in selling and servicing automobiles" to include service advisors despite the contrary interpretation stated in the current regulations. The proposal addresses these issues.
- In 1974, Congress also revised aspects of the FLSA's tip credit provisions which, as further revised by amendments enacted in 1977, impact the existing regulatory guidance on tips. The rules are being updated to reflect current statutory law regarding tip credits.

In addition, several courts have ruled that an employer may claim credit against wages for the reasonable cost of providing employees with meals and may require their acceptance as a

mandatory condition of employment. The proposal updates the regulations to include the agency's longstanding enforcement position adopting these court decisions.

- In 1985, Congress added comp-time for certain public sector employees. Several appellate court decisions have interpreted the statutory language in section 7(o)(5) of the FLSA concerning public sector employers' obligation to grant employee requests to use compensatory time off "within a reasonable period after making the request" if the use of compensatory time does not unduly disrupt the agency's operations. Clarifying revisions are included adhering to these court rulings.
- In 1996, Congress amended the Portal Act to define certain circumstances when pay is not required for employees who use vehicles provided by their employers for home-to-work commuting purposes. The 1996 amendments also created a new FLSA youth opportunity wage that allows an employer to pay an employee under 20 years of age a minimum wage of \$4.25 per hour during the employee's first 90 consecutive calendar days of initial employment with the employer. The 1996 amendments also established the minimum cash wage required to be paid to tipped employees at \$2.13 per hour and limited the allowable hourly tip credit to the difference between \$2.13 and the applicable minimum wage required by section 6(a)(1) of the FLSA.
- In 1997, Congress expanded an existing FLSA overtime pay exemption for workers on ditches, canals and reservoirs where 90 percent (rather than 100 percent) of the water is used for agricultural purposes.
- In 1998, Congress amended the definition of "employee" to exclude individuals who volunteer solely for humanitarian purposes to private non-profit food banks and who receive groceries from those food banks.
- In 1999, Congress added a new definition for employees engaged in "fire protection activities." This change affected the scope of the partial overtime exemption in section 7(k) of the FLSA.
- In 2000, Congress amended the FLSA to provide that stock options meeting certain criteria were an additional type of remuneration that could be excluded from the regular rate when computing overtime pay.
- In 2007, Congress increased the general FLSA minimum wage in three steps, to: \$5.85 per hour effective July 24, 2007; \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009.
- The proposal also clarifies and updates the regulations governing the "fluctuating workweek" method of computing overtime pay for salaried nonexempt employees whose weekly work hours vary or fluctuate, and who receive a fixed salary as compensation (apart from overtime premiums) for whatever hours they are called upon to work in a workweek, whether few or many. The proposed clarifying revision would eliminate language that discourages employers from paying bonuses or premium payments in addition to salary (*e.g.*, nightshift differentials or hazard pay) by sometimes invalidating the fluctuating workweek method of overtime computation where such payments are made.